UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE CARTOON NETWORK LP, LLLP and CABLE NEWS NETWORK LP, LLLP,

Plaintiffs/Counterclaim Defendants,

v.

CSC HOLDINGS, INC. and CABLEVISION SYSTEMS CORPORATION,

Defendants/Counterclaim Plaintiffs/ Third-Party Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., CABLE NEWS NETWORK LP, LLP, TURNER NETWORK SALES, INC., TURNER CLASSIC MOVIES, L.P., LLLP, TURNER NETWORK TELEVISION LP, LLLP, and THE CARTOON NETWORK LP, LLP,

Third-Party Defendants.

06 Civ. 4092 (DC)

RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS AND ADDITIONAL STATEMENTS OF MATERIAL FACT PURSUANT TO LOCAL RULE 56.1(b)

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September 22, 2006

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Pursuant to Rule 56.1(b) of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs and Counterclaim Defendants The Cartoon Network LP, LLLP and Cable News Network LP, LLLP and Third-Party Defendants Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP and Turner Network Television LP, LLLP (collectively "Turner") contest the alleged facts set out in the statement of Material Undisputed Facts that CSC Holdings Inc. and Cablevision Systems Corp. (collectively "Cablevision") submitted with its motion for Summary Judgment on August 25, 2006 as follows:

STATEMENT OF CONTESTED FACTS PURSUANT TO LOCAL RULE 56.1(b) IN OPPOSITION TO CABLEVISION'S MOTION FOR SUMMARY JUDGMENT

1. *In March of 2006, Cablevision sent letters to many of the entities that supply television programming for Cablevision's cable services, including to each of the plaintiffs in this case, describing the basic functionality of Remote Storage Digital Video Recorder ("RS-DVR") product and notifying them of its intent to commence a technical trial in June of this year, and to offer the product to subscribers soon thereafter. Complaint of The Cartoon Network LP, LLLP, et al., dated May 26, 2006 ("Turner Complaint") ¶ 19; Cablevision's Answer, Counterclaim, and Third-Party Claim, dated June 19, 2006 ("Turner Answer") ¶¶ 19, 82.*

1. Turner denies that the service that Cablevision calls a Remote-Storage Video Recorder ("RS-DVR") is a "product". The RS-DVR that is the subject of this lawsuit is a service (the "RS-DVR Service"), and Cablevision has referred to it as such in its own internal documents. (*See*, *e.g.*, CSC001749-55 (tab 73) at CSC001749; CSC002604-05 (tab 67) at CSC002604; CSC01114 (tab 68); CSC001184-91 (tab 69) at CSC001186, CSC001187, CSC001189; Mitchko Ex. 14 (tab 77) at CSC003570.) Turner further denies that Cablevision identified the RS-DVR Service as a product in the letters it sent

to Turner and others on March 21, 2006 announcing the RS-DVR Service. (Budill Ex. 4 (tab 34).)[1]

2. *Cablevision currently provides to various of its customers Cablevision-owned, Scientific-Atlanta manufactured set-top storage DVRs (known by their model number, 8300), which contain hard drives and enable digital cable customers to digitally record programming owned by each of the plaintiffs and third-party-defendants in these cases. Declaration of Stephanie Mitchko ("Mitchko Decl.") ¶¶ 5-6.*

2. Turner denies that the digital video recorder ("DVR") embedded in the Scientific Atlanta set-top cable box bearing the model number 8300 is known as a "set-top storage DVR". (*See, e.g.*, Mitchko Ex. 36 (tab 37) at CSC000003 (referring to the "SA 8300 series digital set top box"); Gottesman Ex. 5 (tab 70) at CSC0099999 (referring to the "Existing DVR 8300 Set Top Box").) Responding further, Turner states that Cablevision leases to certain of its subscribers cable boxes that contain an embedded DVR (a "set-top DVR"), such as a Scientific Atlanta 8300 set-top DVR. (Turner SoF ¶¶ 66-67.) Cablevision subscribers can record and store programming in the set-top DVR and play programming back from the set-top DVR. (Turner SoF ¶¶ 63-65.)

3. *Various Cablevision customers currently have in their homes digital cable boxes that, unlike the 8300, do not support digital video recording. Mitchko Decl. ¶ 11.*

3. Turner denies paragraph 3, except admits that Cablevision provides certain subscribers with cable boxes that do not have a DVR embedded in them. Turner states that the phrase "do not support digital video recording" is too vague and ambiguous to be a factual assertion. Responding further, Turner states that Cablevision subscribers with

[1] Tabs 1-64 appear in the Annex to Turner's Rule 56.1 Statement filed on August 25, 2006 (Volumes I-III). Tabs 65-81 appear in the Supplement to that Annex filed on September 22, 2006 (Volume IV). References to "Turner SoF" refer to the Statement of Material Facts Pusuant to Local Rule 56.1(a) in Support of Turner's Motion for Summary Judgment.

cable boxes that do not have a DVR embedded in them can purchase a DVR and use it for digital recording. (Turner SoF ¶ 61; Mitchko Tr. (tab 6) at 253:10-20.)

4. *RS-DVR will enable customers with these non-DVR digital cable boxes to record the same television programming that its 8300 customers currently can (that is, all linear programming within the specific tier of programming for which the customer has paid (which includes prescheduled pay-per-view ("PPV") but not Video on Demand ("VOD") or nontraditional interactive services ("Subscription Programming")). Mitchko Decl. ¶¶ 6, 12, 15; Declaration of Robert D. Carroll ("Carroll Decl.") Ex. B, Gottesman Dep. at 245:4-8.*

4. Turner denies that the RS-DVR Service will "enable customers" to record anything as part of the RS-DVR Service. The RS-DVR Service will enable Cablevision subscribers to request that Cablevision record programming for them. (Turner SoF ¶ 103.) Turner further denies that the programming that Cablevision will transmit as part of the RS-DVR Service is programming for which the customer has paid. A subscriber to Cablevision's television programming service pays only for the receipt of linear network feed in real time, and not a copy of the programming or the ability to view the programming on demand. (Turner SoF ¶¶ 85-117.) Responding further, Turner states that the phrase "nontraditional interactive services" is too vague and ambiguous to be a factual assertion.

5. *With the same remote control used with the 8300, the RS-DVR customer will perform the same manual operations as 8300 customers (e.g., pressing the "record" or "play" button) to record a program or play back a program he or she has recorded. Mitchko Decl. ¶ 12.*

5. Turner admits that Cablevision will provide subscribers to its RS-DVR Service the same model of remote control that it provides to its subscribers who lease an SA 8300 set-top box. Turner denies that the Cablevision subscriber will record anything or play back anything as part of the RS-DVR Service. The RS-DVR Service will enable Cablevision's subscribers to request that Cablevision copy and later transmit

programming. (Turner SoF ¶¶ 103, 111-117.) Turner admits that Cablevision has designed the RS-DVR Service such that an RS-DVR Service subscriber can perform substantially the same manual operations on a remote control as the user of a SA 8300 set-top DVR, but denies that the manual operations will cause the same recording or playback processes to occur. (Turner SoF ¶¶ 61, 63-65, 95-103, 111-117.)

6. *All recordings made using the RS-DVR are customer-initiated. The RS-DVR system only operates in response to customer input. In other words, a program will be recorded and accessible to the customer if and only if that customer performed the necessary operations on his remote control (i.e., pressing "record"). Thus, Cablevision does not choose what programs are recorded on the RS-DVR; the customer does. Mitchko Decl. ¶¶ 16, 17.*

6. Turner denies paragraph 6. The RS-DVR Service is not "customer initiated" because before any recording can take place Cablevision must take the following steps: Cablevision must make the RS-DVR Service available to its subscribers. (Turner SoF ¶ 68.) Cablevision must select which programming will be made available as part of the RS-DVR Service, and could choose not to make certain programming available. (Turner SoF ¶¶ 74-76.) Cablevision must split off a stream of programming from BarcoNet. (Turner SoF ¶¶ 85-86.)

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7. *From the moment the customer presses "record" on his or her remote, the recording process is entirely automated and involves no human intervention or decision-making by any employee at Cablevision. Mitchko Decl. ¶¶ 20, 21, 31.*

7. Turner denies paragraph 7 insofar as it implies that all processes necessary for recording flow from the subscriber's pressing the "record" button. Before any recording can take place, Cablevision must take the following steps: Cablevision must make the RS-DVR Service available to its subscribers. (Turner SoF ¶ 68.) Cablevision must select which programming will be made available as part of the RS-DVR Service, and could choose not to make certain programming available. (Turner SoF ¶¶ 74-76.) Cablevision must split off a stream of programming from BarcoNet. (Turner SoF ¶¶ 85-86.)

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Cablevision must direct the stream of programming into the Arroyo servers. (Turner SoF ¶¶ 92-95.) Responding further, Turner states that there are many instances where a subscriber's pressing the "record" button will not result in a programming being recorded, such as when the subscriber's record request would result in the simultaneous recording of more than two programs for a given subscriber. (Mitchko Decl. ¶ 22(d).) Turner states that that Cablevision has made business decisions that limit the programming that Cablevision will record. (*See, e.g.*, Turner SoF ¶ 135.) Turner also states that Cablevision employees have the ability to delete programming stored on the Arroyo servers, or prevent a program from streaming. (Caramanica Tr. (tab 66) at 155:12-156:4, 212:9-16.)

8. *The resulting chain of automated processes involves computer hardware and software located at a Cablevision "head-end" (a "head-end" is a central facility of a cable operator, which houses much of the software and hardware necessary to run a cable system), ultimately resulting in a separate recording of the program being written*

to a specific hard drive in a computer server located at Cablevision's facilities. Mitchko Decl. ¶¶ 13, 14, 21-27, 29, 31.

8. Turner denies paragraph 8 for the reasons set out in paragraphs 6 and 7. Turner admits that a "head-end" is "the point at which all programming is collected and formatted for placement on the cable system" (Turner SoF ¶ 45), and as such is "a central facility of a cable operator, which houses much of the software and hardware necessary to run a cable system". Responding further, Cablevision states that almost all of the hardware and software that Cablevision uses to copy, store and transmit programming as part of the RS-DVR Service will be located at a Cablevision head-end. (Turner SoF ¶¶ 81, 84; Mitchko Ex. 4 (tab 48); Caramanica Tr. (tab 66) at 158:5-163:10.)

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9. *All programs recorded by a given customer will be stored on the same physical hard drive, which he will share with anywhere from one to three other customers, and on which he has been allocated a specific amount of storage space. Through use of identifiers, each copy is uniquely associated with the set-top box through which the record command was sent, and can be retrieved only by that same set-top box, meaning that no customer will be able to access another customer's copies. Mitchko Decl. ¶¶ 14, 24, 36, 38, 41; Carroll Decl. Ex. A, Mitchko Dep. at 47:13-48:3, 61:8-23, 63:12-24.*

9. Turner denies paragraph 9. Cablevision's subscribers will not record anything with the RS-DVR Service. The RS-DVR Service will enable Cablevision's subscribers to request that Cablevision record programming.

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An RS-DVR Service subscriber does not "access" or "retrieve" programming, rather, just as with video-on-demand, an RS-DVR Service subscriber requests Cablevision to transmit certain programming. (Turner SoF ¶¶ 111-117.) Responding further, Turner states that "[w]hen Cablevision plays back programming from its Arroyo servers to a subscriber as part of the RS-DVR Service, Cablevision transmits the same programming to all the set-top boxes in the node of the requesting subscriber, but only the requesting subscriber will be able to view the programming". (Turner SoF ¶¶ 114, 116.)

10. *Thus, if 1000 customers elect to record a given program, 1000 separate copies of the program are created, each uniquely associated with each customer's set-top box and accessible only by that customer. Mitchko Decl. ¶¶ 14, 24, 29, 36, 38, 41; Carroll Decl. Ex. C, Blattman Dep. at 182:24-183:23; Carroll Decl. Ex. A, Mitchko Dep. at 316:22-318:2.*

10. Turner denies paragraph 10. An RS-DVR Service subscriber does not "access" programming, rather, just as with video-on-demand, an RS-DVR Service subscriber requests Cablevision to transmit certain programming. (Turner SoF ¶¶ 58-60, 111-117.) Responding further, Turner states that "[w]hen Cablevision plays back programming from its Arroyo servers to a subscriber as part of the RS-DVR Service, Cablevision transmits the same programming to all the set-top boxes in the node of the requesting subscriber, but only the requesting subscriber will be able to view the

programming". (Turner SoF ¶¶ 114, 116.) Turner admits that "Cablevision makes at least one complete reproduction of programming for every subscriber who has requested a copy of that programming". (Turner SoF ¶ 103.) Cablevision maintains a database of copies that it has recorded categorized by set-top box, but the copies do not exist in a contiguous block on a given hard drive and Cablevision has "no method of viewing the memory location" of recordings it has made on a particular hard drive. (Turner SoF ¶¶ 103-104, 106-108; Caramanica Tr. (tab 66) at 73:3-76:4, 179:23-182:9; Caramanica Ex. 14 (tab 71) at CSC054568, CSC054570.) Responding further, Turner states that Cablevision makes multiple other copies, including copies in buffers on the Clamper and on the Arroyo servers, which are inaccessible to RS-DVR Service subscribers. (Turner SoF ¶¶ 90, 95, 98.)

11. *Just as it is the customer who decides what programs to record and initiates the recording process, so it is the customer who decides what programs to play back when and initiates the retrieval process by pressing "play" on his or her remote control. From that point on, the retrieval and playback process is entirely automated. What is played back to the customer is his own unique copy--that is, the copy of the program that was created as a result of his earlier record command and that is uniquely and exclusively associated with the set-top box through which such command was made. Mitchko Decl. ¶¶ 33-34, 37-39, 41, 43; Carroll Decl. Ex. A, Mitchko Dep. at 71:9-23; 73:2-12, 84:17-85:7.*

11. Turner denies paragraph 11. An RS-DVR Service subscriber does not "access" or "retrieve" programming, but, just as with video-on-demand, an RS-DVR Service subscriber requests that Cablevision transmit certain programming. (Turner SoF ¶¶ 111-117.) As part of the RS-DVR Service, the RS-DVR Service subscriber does not maintain a copy of programming in a set-top box in his or her home, but rather Cablevision makes and stores a copy for each subscriber request on hard drives at its head-end. (Turner SoF ¶ 103.) Cablevision maintains a database of copies that it has recorded categorized by set-top box, but the copies do not exist in a contiguous block on

a given hard drive and Cablevision has "no method of viewing the memory location" of recordings it has made on a particular hard drive. (Turner SoF ¶¶ 103-104, 106-108; Caramanica Tr. (tab 66) at 73:3-76:4, 179:23-182:9; Caramanica Ex. 14 (tab 71) at CSC054568, CSC054570.) Turner denies that each copy that Cablevision makes for a subscriber is a "unique" copy. Each copy is substantially identical to the linear network feed and to copies Cablevision stores for other subscribers. (Turner SoF ¶ 105.) Just as with video-on-demand, when an RS-DVR Service subscriber requests Cablevision to transmit certain programming, Cablevision will transmit that programming to everyone in the subscriber's node, but only that subscriber will be able to view it. (Turner SoF ¶¶ 58-60, 111-117.) Responding further, Turner states that Cablevision has made a business decision about whether or not to honor certain requests for playback. (Mitchko Ex. 26 (tab 72) at CSC003227; Mitchko Tr. (tab 6) at 185:3-186:22.)

12. *At various points during the RS-DVR processes, data is "buffered," meaning that small fragments of programming data are placed in random access memory for a brief period of time in order to effectuate system processes. Mitchko Decl. ¶ 28, 40.*

12.

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ADDITIONAL STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 56.1(b) IN SUPPORT OF TURNER'S OPPOSITION TO CABLEVISION'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56.1(b) of the Local Rules of the United States District Court for the Southern District of New York, Plaintiffs and Counterclaim Defendants The Cartoon Network LP, LLLP and Cable News Network LP, LLLP and Third-Party Defendants Turner Broadcasting System, Inc., Turner Network Sales, Inc., Turner Classic Movies LP, LLLP and Turner Network Television LP, LLLP (collectively the "Turner Entities") contend that there is no genuine issue to be tried with respect to the following material facts:

1. In its internal documents, Cablevision has repeatedly referred to the RS-DVR as a service. (CSC001749-55 (tab 73) at CSC001749; CSC002604-05 (tab 67) at CSC002604; CSC01114 (tab 68); CSC001184-91 (tab 69) at CSC001186, CSC001187, CSC001189; Mitchko Ex. 14 (tab 77) at CSC003570.)

2. The Cablevision head-ends where the equipment for the RS-DVR Service will be maintained are staffed by two to thirty individuals at any time, and Cablevision employees will monitor equipment used to provide the RS-DVR Service to ensure it is functioning properly. (Lee Tr. (tab 65) at 72:5-78:13, 141:24-143:13.)

3. The network system that Cablevision intends to use to make the RS-DVR Service available for the technical trial is comprised of at least 12 servers, 2 databases, 1 switch and multiple hard drives, as well as many optical cables and GigE transport cables, which connect various components of the system. (Mitchko Ex. 4 (tab 48); Caramanica Ex. 16 (tab 74) at 34, 39, 42, 44-45; Caramanica Tr. (tab 66) at 219:3-226:6; Lee Tr. (tab 65) at 22:12-24:14, 61:15-63:4.)

4. The various servers that Cablevision intends to use to make the RS-DVR Service available for the technical trial will be located in different areas in Cablevision's head-end, as indicated by the different colors on the network diagram. (Mitchko Ex. 4 (tab 48); Caramanica Tr. (tab 66) at 158:5-163:10.)

5. If Cablevision were to implement a full-scale roll-out of the RS-DVR Service, Cablevision would have to purchase "thousands of storage servers, thousands of switch ports and at least hundreds of QAM devices". (Lee Ex. 19 (tab 75) at CSC063428; Lee Tr. (tab 65) at 122:8-128:7.)

6. Cablevision plans to make 170 linear networks available as part of a full-scale roll-out of RS-DVR Service. (Mitchko Tr. (tab 6) at 216:19-217:10, 219:2-7.)

7. It is technologically possible for Cablevision to include less than 170 linear networks as part of the RS-DVR Service. (Mitchko Tr. (tab 6) at 228:13-21.)

8. A Cablevision document entitled "High Level Sizing for Customer Launch" indicates that Cablevision assumed for financial modeling purposes that in a full-scale roll-out of the RS-DVR Service, Cablevision would allocate 160 gigabytes of storage per set-top box enrolled in the RS-DVR Service. (Mitchko Ex. 33 (tab 45) at CSC000771.)

9. Cablevision plans to allow its RS-DVR Service subscribers to increase the number of gigabytes of storage that they are allocated. (Blattman Tr. (tab 1) at 211:1-8; Blattman Ex. 31 (tab 79) at Arroyo 002845; CSC003031-32 (tab 43) at CSC003031.)

10. Cablevision has referred to the RS-DVR Service as being rolled out in different "phases" with different functionality for each phase. (*See, e.g.*, Mitchko Ex. 9 (tab 76) at CSC005047; Mitchko Ex. 14 (tab 77); Gottesman Ex. 9 (tab 78) at CSC011839.)

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12. A May 3, 2006 Cablefax Daily article reported that Tom Rutledge, Cablevision's Chief Operating Officer, believes Cablevision can use the transmission of programming as part of the RS-DVR Service "to tweak stored video in the network". The article Mr. Rutledge as saying advertisement opportunities included "product placement after the fact or refreshment of advertisement opportunities". (Gottesman Ex. 6 (tab 80) at CSC011864.)

13. In order to view programming stored on a set-top DVR the cable operator does not transmit recorded programming over any external cable lines. (Lee Tr. (tab 65) at 78:18-79:5.)

14. Cablevision employees have the ability to delete programming associated with a particular set-top box and stored on a hard drive on an Arroyo server. (Caramanica Tr. (tab 66) at 155:12-156:4, 212:9-16.)

15. Cablevision employees have the ability to delete a stream of programming as it is being transmitted to an RS-DVR Service subscriber. (Caramanica Ex. 16 (tab 74) at 24; Caramanica Tr. (tab 66) 211:17-212:8.)

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25. With a DVR, multiple speeds of fast-forward and rewind available to RS-DVR Service subscribers. (Gottesman Ex. 4 (tab 32) at CSC011906.)

26. For the technical trial of the RS-DVR Service, Cablevision intended to make only one speed of fast-forward and rewind available to RS-DVR Service subscribers. (Gottesman Ex. 4 (tab 32) at CSC011906; Mitchko Ex. 36 (tab 37) at CSC000006; Mitchko Ex. 37 (tab 42) at CSC000044.)

27. With a DVR, a user can manually record programming, that is, a user can manually enter a start time and an end time that does not necessarily comport with a scheduled program. (Gottesman Ex. 4 (tab 32) at CSC011910; Caramanica Tr. (tab 66) at 69:6-19.)

28. Subscribers to the RS-DVR Service will not be able to manually record programming, that is an RS-DVR Service subscriber cannot request a recording "by inputting a manual start time and end time that does not coincide with the start and end

times on the electronic program guide". (Mitchko Ex. 37 (tab 42) at CSC000041; Gottesman Ex. 4 (tab 32) at CSC011910; Caramanica Tr. (tab 66) at 69:6-19.)

29. With a DVR, a user can play back recorded programming while the program is still being aired as part of the normal television broadcast. (Gottesman Ex. 4 (tab 32) at CSC011910; Mitchko Tr. (tab 6) at 328:12-18.)

30. Subscribers to the RS-DVR Service will not be able to request playback of programming while the program is still being broadcast as part of the normal cable television broadcast. (Mitchko Ex. 37 (tab 42) at CSC000041; Mitchko Tr. (tab 6) at 328:12-23, 329:14-332:23; Gottesman Ex. 4 (tab 32) at CSC011907.)

31. With a DVR, a user who presses record while a program is in progress can capture the entire program as long as the DVR was tuned to that channel from the beginning of the program. (CSC016142-43 (tab 81) at CSC016143; Gottesman Ex. 4 (tab 32) at CSC011907.)

32. Subscribers to the RS-DVR Service who press record while a program is in progress will only be able to request that Cablevision record and playback the portion of the program from that moment forward. (CSC016142-43 (tab 81) at CSC016142; Gottesman Ex. 4 (tab 32) at CSC011907; Mitchko Tr. (tab 6) at 332:6-23.)

33. With a DVR, a user can "bookmark", which is the ability to mark a program so that you can resume playback from that spot after an extended period of time has passed. (Gottesman Ex. 4 (tab 32) at CSC011914.)

34. Subscribers to the RS-DVR Service will not be able to "bookmark" programming. (Gottesman Ex. 4 (tab 32) at CSC011914; Mitchko Ex. 37 (tab 42) at CSC000041.)

35. Certain Turner linear networks, including the Cartoon Network, CNN, TBS and TNT, will be available part of the RS-DVR Service. (Mitchko Ex. 36 (tab 37) at CSC000004.)

36. Turner informed Cablevision in a letter dated May 10, 2006 that "proceeding with the Service even on a trial basis, would be illegal under the Copyright laws". (CSC004354 (tab 64).)

September 22, 2006

Respectfully submitted,

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By [signature]

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